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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 461

Case No. 449: ZAFARI

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-President, presiding; Mr. Ahmed Osman; Mr. Ioan Voicu;

Whereas, on 16 April 1987, Aref Rashed Zafari, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application that did not fulfil the formal requirements of the Rules of the Tribunal;

Whereas, on 10 November 1987, the Applicant, after making the necessary corrections, again filed an application containing the following pleas:

"SECTION II - PLEAS:

Appeal is hereby made to the esteemed Tribunal to take the following decisions:

a. Hearing, if need be, of witnesses Messrs. Frank De Jonge, the present Director of UNRWA Affairs, SAR [Syrian Arab Republic], and Michel Daum, the then Administration Officer, UNRWA, SAR. The first, for the circumstances and events connected with my termination, appeal, and verbal approaches and personal contacts to solve the dispute amicably; the second for the circumstances and facts related to the arbitrary termination.

b. Rescission of the following recommendations and decisions:

1. Director UNRWA Affairs, SAR, decision of termination URD/314 dated 5 May 1985, under area regulation 9.1 (...).

2. Report of the Joint Appeals Board dated 13 September 1985, ... and respective decision of the A/COMGEN'S [Acting Commissioner-General].
LEG/261 (A) dated 19 September 1985, ...
LEG/261 (A) dated 15 November 1985, ...

3. Decision of the Commissioner General to withhold the Appeal to the Special Panel of Adjudicators etc. ...

c. The following compensation under article 9 of the Statute is solicited including:-

1. Payment of accrued salaries from the time of termination and until the date of the decision as and when taken by the esteemed Tribunal.

2. Suitable compensation left to be assessed by the esteemed Tribunal in light of the injury and loss (moral and material) sustained.

3. Warranting re-engagement with the UN."

Whereas, on 22 September 1988, the Respondent filed his answer;

Whereas, on 19 October 1988, the Applicant filed written observations;

Whereas, on 30 December 1988, the Respondent filed additional documents;

Whereas, on 20 March 1989 and 3 April 1989, the Applicant submitted comments on the Respondent's submission and an additional document;

Whereas, on 8 June 1989, the Respondent submitted additional comments, and on 18 July 1989, the Applicant commented thereon;

Whereas, on 3 October 1989, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 9 October 1989, the Respondent filed additional observations;

Whereas, on 10 October 1989, the Applicant filed an additional document;

Whereas the facts in the case are as follows:

Aref Rashed Zafari was recruited by UNRWA on 16 July 1952 as a Registration Clerk. He served thereafter in different capacities on a temporary indefinite appointment until 1 January 1979, when he was appointed Area Officer for the Damascus area.

According to the record of the case, on 2 May 1985, the Applicant, who by then had reached the G-16, step 10 level, and the Director of UNRWA Affairs for the Syrian Arab Republic (SAR) were engaged in a discussion, and as result, the Director decided to terminate the Applicant's appointment. In a letter dated 5 May 1985, the Director of UNRWA Affairs for the SAR confirmed the substance of their discussion as follows:

> "...
>
> I confirm my verbal statement to you of that day that I have lost my confidence in you and that I cannot permit you to remain in your present post as my representative nor can I offer you any other senior post for the same reason. I also confirm that:-
>
> a) You will be on annual leave status from close of business 2 May 1985 up to and including 28 May 1985.
>
> b) I am terminating your services in the interests of the Agency under staff regulation 9.1. Your services will be terminated as at close of business on Tuesday 28 May 1985.
>
> c) The Field Administration will communicate with you on all the formalities necessary.
>
> ..."

On 7 May 1985, the Applicant informed the UNRWA Administration that he opted for "early voluntary retirement benefit". The Administration approved the Applicant's option, pursuant to area staff rule 109.2, paragraph 11, and on 12 May 1985, issued a Personnel Action Form to implement the Applicant's separation from the service of UNRWA. It stated:

> "Mr. Zafari is terminated in the interest of the Agency, and since he is over 50 years old and has more than 10 years of service in the Agency and according to SR.[staff rule] 109.2

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para. 11 the mode of separation has been changed to Early Voluntary Retirement upon Mr. Zafari's request."

On 3 June 1985, the Applicant requested the Director of UNRWA Affairs for the SAR to review the decision to terminate his appointment in the interest of the Agency. On the next day, the UNRWA Administration asked the Applicant to "dispose" of the Personnel Action Form which had been issued on 12 May, and sent him a corrected one dated 4 June 1985, that did not contain references to "termination in the interest of the Agency" and which stated:

"With reference to Mr. Zafari request of 2.5.1985 and in accordance with SR.109.2 para. 11, Mr. Zafari being over 50 years old and having more than 10 years service in the Agency, mode of separation is Early Voluntary Retirement."

On the same date, the Director of UNRWA Affairs for the SAR asked the Applicant whether he wished to reconsider his request for review, when he "realized" that the letter of 5 May 1985, conveying the administrative decision to terminate his appointment had been "automatically withdrawn, in accordance with staff rule 109.2, para. 11" when the Applicant had "opted for Early Voluntary Retirement". In a reply dated 9 June 1985, the Applicant informed the Director of UNRWA Affairs for the SAR that he was maintaining his appeal.

On 23 June 1985, the Applicant lodged an appeal with the Joint Appeals Board (JAB). In his letter of appeal, he requested reinstatement to his previous post, and compensation for the pain and the damage caused by the decision to terminate him. On 24 June 1985, the Acting Director of UNRWA Affairs for the SAR informed the Applicant that since he had "opted for early voluntary retirement" there was no basis for an appeal. In a letter dated 23 July 1985, the Secretary of JAB informed the Applicant that his appeal was "not receivable under the terms of staff regulation 11.1" since his separation from the service of the Agency "was made on the ground of 'Early Voluntary Retirement'", at his request. In a reply dated 7 August 1985, the Applicant restated the grounds for his appeal and asked the Board to consider his appeal receivable.

In a letter dated 12 September 1985, the Secretary of JAB informed the Applicant that "a special Board" had been established to deal with the

question of the receivability of his appeal. He listed therein the names of the staff members who had been designated to serve on the "special Board". On the next day, the special Board adopted its report. Its conclusion reads as follows:

> "... since it is not a termination case, it is not within the jurisdiction of the Board to decide on the receivability of the appeal raised by Mr. Zafari. In the light of standing Staff Rules and Regulations, it is the Board's firm conclusion that this is purely an administrative matter which should be handled by the Administration and The Legal Adviser."

On 19 September 1985, the Acting Commissioner-General of UNRWA transmitted to the Applicant a copy of the report, and noted that the Board had "concluded that in terms of the staff regulations and rules it cannot deal with the matter."

On 26 September 1985, the Applicant received the letter from the Secretary of JAB, communicating to him the establishment and composition of the "special Board". On 27 September 1985 - not knowing that the "special Board" had met and taken a decision on his case - he wrote to the Secretary of the Board and challenged one of the members who had been designated to serve on the Board.

On 12 October 1985, one of the members of the "special Board" informed the Secretary of JAB that he had concluded that the meeting of JAB held on 13 September 1985 "was improper", did not meet the requirements of the Staff Rules, and "should be considered as null and void". The Applicant should be allowed "to agree or disagree on the composition of the Board" and a new meeting, fulfilling the requirements of the Staff Rules should be convened.

On 21 October 1985, the Applicant wrote to the Commissioner-General setting forth the grounds for his appeal and requesting that his case be heard again by a properly constituted Joint Appeals Board. In a reply dated 15 November 1985, the Director of Personnel rejected his request, essentially on the ground that "in seeking the benefits under area staff rule 109.2, paragraph 8, an appeal under the Staff Regulations and Rules was automatically excluded, as such benefits are payable only upon separation by early voluntary retirement."

On 17 December 1985, the Applicant filed an appeal with the Secretary of the Special Panel of Adjudicators against the decision to terminate his services. In a letter dated 15 January 1986, the Director of UNRWA Affairs for the SAR advised the Applicant that the Director of Personnel at Headquarters had requested that the Applicant "be informed that the unanimous recommendation of the Joint Appeals Board ... was accepted by the Commissioner-General and as such bars any further appeal to the Panel of Adjudicators, as stipulated in area staff regulation 11.1(c) ...". An exchange of correspondence ensued between the Applicant and the Administration. The Applicant reiterated his request for the case to be heard by the Special Panel of Adjudicators and the Administration maintained its position that:

> "A decision on [the Applicant's] part to retire with the relevant benefits rather than have [his] services terminated necessarily meant that there was no possibility of an appeal which, under the relevant Staff Regulations and Rules, arises only in the case of termination."

On 10 November 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment under the area Staff Regulations and Rules was motivated by personal prejudice, bias and proven extraneous factors. The Applicant did not request early voluntary retirement under area staff rule 109.2.

2. The Applicant was not given the opportunity to express his views concerning the composition of the "special Board" in violation of area staff rule 111.3(b).

3. The "special Board" established by the Administration to deal with the question of the receivability of his appeal, is not the JAB prescribed in area staff rule 111.1, and consequently its report cannot be considered a JAB report.

4. The assertion by one of the members of the special Board that the meeting at which the so-called JAB report was adopted was improper and that the report should be declared null and void, vitiates the whole proceedings before the "special Board" and the JAB recommendation cannot be considered unanimous.

5. The Administration severely curtailed the Applicant's right to appeal to the Panel of Adjudicators.

Whereas the Respondent's principal contentions are:

1. The Administrative Tribunal is not competent to hear applications from UNRWA area staff.

2. Recourse procedures available to area staff members are set forth in the UNRWA area Staff Regulations and Rules and do not provide for recourse to the United Nations Administrative Tribunal.

The Tribunal, having deliberated from 24 October to 10 November 1989, now pronounces the following judgement:

I. In the present case, the Tribunal again has before it a dispute between a staff member of UNRWA recruited under the UNRWA area Staff Regulations and Staff Rules, and the organization which employed him. Once again, the Respondent alleges that the Tribunal is not competent. By simply pleading that the Tribunal is not competent and not presenting, as a subsidiary matter, his contentions on the substance, counsel for the Respondent delayed settlement of the dispute.

II. In contesting the competence of the Tribunal, the Respondent attempts to distinguish between this case and the Hilpern case (Judgement No. 57 (1955)). He maintains that there is no agreement, "explicitly asserted or implied" affirming the Tribunal's competence.

III. In fact, in the Hilpern judgement, the Tribunal's decision on its competence was not made on an ad hoc basis, particular to that case. The Tribunal expressly rejected the Respondent's contention that "the Tribunal is competent to hear applications from staff members of the United Nations Secretariat only". It observed that the jurisdiction of the Tribunal might be extended to any specialized agency upon the terms established by a special agreement to that effect between such agency and the Secretary-General (Judgement No. 57, para. 5). Such an agreement is all the more

possible between the Commissioner-General of UNRWA - which, moreover, is not a specialized agency but a subsidiary organ established by the General Assembly under Article 22 of the Charter - and the Secretary-General of the United Nations. The Tribunal observed that such an agreement did exist between the Secretary-General and the Commissioner-General of UNRWA (para. 6).

The Tribunal concluded that, at least at the time, the provisions of the Staff Regulations of the United Nations and Staff Rules concerning the right of appeal to the Tribunal could be invoked by staff members of UNRWA (paras. 6 and 7 at the end of the judgement).

IV. In the Radicopoulos case (Judgement No. 70, para. 8 (1957)), the Tribunal confirmed its jurisdiction in the following terms:

> "8. The Tribunal, therefore, considers that since no mandatory provisions instituting another procedure had been laid down at the time of the application, it is competent to deal with the application on the basis of the agreement established under resolution 302(IV) [whereby UNRWA was established as a subsidiary organ under Article 22 of the Charter], in accordance with the interpretation placed upon that resolution and described in Judgement No. 57."

V. The Respondent now invokes that UNRWA area Staff Regulations and Staff Rules to support his contention that the Tribunal is not longer competent.

VI. The Respondent refers to chapter XI of these Regulations entitled "Administrative remedies of staff". He states that the Applicant's appeal was considered by a "special Board" of the Joint Appeals Board (JAB). The Board concluded that it was "purely an administrative matter which should be handled by the Administration and the The Legal Adviser." As a result, the Board unanimously declared itself not competent to handle the matter. The Applicant was informed that the unanimous recommendation of the JAB had been accepted by the Commissioner-General of UNRWA and that therefore any further appeal to the Panel of Adjudicators was barred, as stipulated in area staff regulation 11.1(c).

VII. The Tribunal notes that the Applicant is thus deprived of any recourse against the decision of the Commissioner-General of UNRWA. The Applicant has truly been denied justice. There is a legal vacuum which the existing area Staff Regulations and Staff Rules have not filled.

VIII. The Tribunal recalls, in this connection, the well-founded opinion of the International Court of Justice in its opinion of 13 July 1954 concerning awards of compensation made by the United Nations Administrative Tribunal:

> "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954: I.C.J., Reports 1954, p. 57).

IX. The Tribunal also refers to Judgement No. 378, Bohn and No. 379, Gilbert (1986), in which it mentioned the relevant considerations of the International Court of Justice concerning the extent of the competence conferred on the International Labour Organisation Administrative Tribunal (Judgements of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational, Scientific and Cultural Organization; ICJ, Reports of Judgements, Advisory Opinions and Orders, 1956, p. 97). The Tribunal deems that these considerations are equally valid for the United Nations Administrative Tribunal:

> "However, the question submitted to the Tribunal was not a dispute between States. It was a controversy between UNESCO and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization."

In its judgements, the Tribunal also took into consideration the fact that, if it were to accept the Respondent's contention regarding its competence, the Applicants would be deprived of the possibility of submitting their claims to any judicial procedure.

X. The Tribunal considers that in the absence of any judicial procedure established by the area Staff Regulations and Staff Rules for the settlement of disputes submitted to the JAB under regulation 11.1, the competence of the Tribunal as stated in its earlier judgements remains. The Tribunal therefore considers that it is competent to deal with the application it has before it.

XI. Before turning to the substance of the case, the Tribunal feels bound to take note of the incoherent and arbitrary nature of the administrative procedures followed in considering the Applicant's contentions.

XII. In his application, the Applicant requested that two witnesses be given a hearing. The Tribunal decides that there is no need for such a hearing, as it is cognizant of all the necessary facts required to decide the points raised by the Applicant. It also confirms the ruling by the presiding member of the panel that no oral proceedings would be held in the case.

XIII. The Applicant joined UNRWA in 1952 as a Registration Clerk. On 1 January 1979, he was appointed Area Officer for the Damascus area. In a letter dated 5 May 1985, the Director of UNRWA Affairs for the Syrian Arab Republic confirmed that, as stated at their meeting on 2 May, he was terminating the Applicant's services. The only reason he gave for the termination was that he had lost his confidence in the Applicant. He added that the decision was "in the interest of the Agency under staff regulation 9.1."

XIV. The Tribunal notes that the Respondent has not disputed the Applicant's allegation that the manner of the termination was abrupt and

arbitrary. The Respondent merely maintains that the Applicant opted for an "early voluntary retirement benefit" and that, accordingly, the mode of his separation was not a termination.

XV. The Tribunal notes that it is true that, on 7 May 1985, just two days after his services were terminated, the Applicant sent the Administration a handwritten note asking for such a benefit. However, the Tribunal considers that this informal note appears to have been written when the Applicant was understandably upset following his abrupt termination. Under the circumstances, the Tribunal considers that that note did not constitute a renunciation of the Applicant's right to seek compensation at a later date for improper dismissal.

XVI. Moreover, the Respondent did not interpret that note as tantamount to such renunciation and merely indicated, quoting the letter dated 5 May 1985, from the Director of UNRWA Affairs for the Syrian Arab Republic, in a Personnel Action Form that: "The Applicant is terminated in the interest of the Agency."

XVII. It was not until the Applicant requested the regional Director of UNRWA, on 3 June 1985, to review the decision to terminate his appointment in the interest of the Agency, that a new Personnel Action Form was issued on 4 June 1985.

The Tribunal notes that this form no longer refers to "termination in the interest of the Agency" which was specifically mentioned in the form issued on 12 May 1985. It cannot accept the downright fiction proposed by the Respondent to change the Applicant's mode of separation from termination to voluntary retirement.

XVIII. At the same time, the Respondent has alleged that the decision to terminate the Applicant's contract had been automatically withdrawn under area staff rule 109.2, paragraph 11.

Contrary to what the Respondent maintains, rule 109.2, paragraph 11 of the area Staff Rules does not state that a request for voluntary early retirement

leads to the "automatic withdrawal" of an administrative decision on termination. The provision states that in the event of a request for early voluntary retirement: "The notice of termination ... shall accordingly be withdrawn". The Tribunal considers that no such withdrawal took place.

XIX. The Tribunal notes that the decision of 2 May 1985, to terminate the services of the Applicant was taken by the Director of UNRWA Affairs for the Syrian Arab Republic under regulation 9.1 of the area Staff Regulations which reads as follows:

> "The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency."

XX. The Director of UNRWA Affairs for the Syrian Arab Republic did not produce any proof that the Commissioner-General had delegated authority to enable him to take such a decision. The Tribunal does not deem it necessary to determine whether the Director had in fact received such a delegation.

XXI. The Tribunal notes, in effect, that the Director did not invoke any facts in support of his opinion that termination of the Applicant's contract would be "in the interest of the Agency". He merely stated that he had lost confidence in the Applicant. The Tribunal considers that this simple statement is insufficient to justify application of regulation 9.1. It does not allow the Tribunal to exercise its power to verify the facts, and whether there was any misuse of power or arbitrary action.

XXII. The Tribunal further notes that at the time the events took place, the Applicant had served the Organization for over 30 years and that he was generally well regarded and appreciated. Under the circumstances, the Tribunal considers that the decision to terminate the Applicant was, in fact, a disciplinary measure. Such a measure should have given rise to application of regulation 10 of the area Staff Regulations and rule 110.1 of the area Staff Rules.

XXIII. The Tribunal therefore concludes that the decision of 2 May 1985 was taken in violation of the Applicant's rights. It must therefore be rescinded.

XXIV. The Applicant requests that he be paid the accrued salaries until the date of his reinstatement in UNRWA. However, during this period, his early retirement benefit was determined and he received the arrears and/or other cash payments. Under the circumstances, all the amounts received as early retirement benefit must be deducted from the accrued salary payable to the Applicant if he is reinstated.

XXV. Should the Respondent decide not to reinstate the Applicant, the Tribunal must decide the compensation to be paid to the Applicant for the injury suffered. It assesses the amount of such compensation at US$ 15,000.

XXVI. For these reasons, the Tribunal decides that:

1. The decision of 2 May 1985 is rescinded.

2. Should the Commissioner-General of UNRWA decide to pay the Applicant compensation, in accordance with article 9.1 of the Statute of the Tribunal such compensation shall be set at US$ 15,000.

3. All other pleas of the Applicant are dismissed.

(Signatures)

Roger PINTO
Vice-President, presiding

Ahmed OSMAN
Member

Ioan VOICU
Member

New York, 10 November 1989

R. Maria VICIEN-MILBURN
Executive Secretary